SUPREME COURT, U. S.

AUG 29 1970

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IN THE

Supreme Court of the United States

OCTOBER TERM, [redacted] 1970

No. [redacted] 256

FIRST MERCANTILE CONSUMER DISCOUNT COMPANY,

Appellant,

v.

ANTHONY E. STEFANELLI, *et al.*,

Appellees,

and

PAUL V. DURKIN, *et al.*,

Appellees,

and

GEORGE F. KUGLER, JR.,
Attorney General of New Jersey,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF NEW JERSEY

REPLY BRIEF AND SUPPLEMENTAL APPENDIX OF APPELLANT FIRST MERCANTILE CONSUMER DISCOUNT COMPANY

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Introduction

This appeal is taken from a 4 to 3 decision which radically departs from settled constitutional principles. The decision is hardly explainable except in the context adverted to by Chief Justice Weintraub in dissent, namely, the "emotional overlay" of a case involving loans at high interest rates. 55 N.J. at 494-95, 262 A. 2d at 877. While the Chief Justice and Justices Hall and Haneman were able to eschew the emotional context—"the case must be decided in that light [that the interest rates have received legislative approval] *and not some personal one*," 55 N.J. at 495, 262 A. 2d at 878 (emphasis added)—the implication is that the other four Justices could not.

Appellees seek the same emotional reaction here. They use heightened language in their briefs. They charge the lenders with "deliberative efforts to avoid New Jersey supervision, such as maneuvering the traditional incidents of a loan transaction to an out-of-state *situs*" (NJAGb19), although there is no proof of this assertion in the record.*

Nor is there proof of the repeated accusations of "victimization" (*e.g., Id.*). The 1965 report of the New Jersey Real Estate Commission, which is relied upon by appellees and by the courts below, constitutes extra-record evidence—hearsay twice removed—by a commission consisting of New Jersey real estate brokers with vested interests in the protectionist legislation they proposed. As can be demonstrated in a plenary brief, it is a report

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* The record does show that the lenders are Pennsylvania corporations, licensed and regulated by Pennsylvania, and having offices only in Pennsylvania. While Oxford is publicly owned, First Mercantile is closely held and its stockholders are Pennsylvania residents.

which does not relate to *licensed* Pennsylvania lenders, still less to the licensed lenders involved in the case at bar. Improperly influenced by this report, the courts below have summarily subjected millions of dollars in loans to forfeiture.

In any event, First Mercantile stands ready to try these issues. Indeed, it is anxious to clear its name. But a trial on the constitutional questions, as is observed *infra*, will only be possible if this Court reverses the judgment below. Absent reversal, appellees will have succeeded in obtaining summary judgment of significant constitutional issues despite the presence of crucial factual disputes.

POINT I

The judgment below is final.

The weakness of appellees' position on the merits is manifest in their strenuous argument, placed in the first point of each of their briefs, that this Court should not resolve a fundamentally important interstate controversy on the technical ground that there is no final judgment.

But the finality principle in 28 *U.S.C.* §1257 does not hobble this Court with technicalities. It does not require rejection of Pennsylvania's plea that this matter be reviewed because Pennsylvania's "vital interests will be adversely affected if the decision of the New Jersey Supreme Court is not reversed" (*Amicus brief*, p. 2).

Nor do technicalities prevent this Court from considering a New Jersey judgment which, since 1968, has effectively precluded Pennsylvania licensees from making secured loans in Pennsylvania to New Jersey borrowers, and which subjects millions of dollars in presently out-

standing Pennsylvania loans to arbitrary forfeiture in the courts of New Jersey.

Appellees are well aware that they and many other New Jersey borrowers have ceased paying back Pennsylvania loans on the basis of the judgment below. And appellees are surely aware that, if this Court declines to act, even on a technicality, numerous other borrowers now awaiting the final word of the highest court, will likewise cease repayments. Thus, what appellees shrewdly argue is premature now, will be overripe later. Indeed, insofar as some lenders are concerned, it will be utterly moot, except in the bankruptcy context.

Appellees' finality argument is shrewd for another reason. They are aware that the New Jersey Supreme Court has entered final judgment not only with respect to all Federal consitutional issues, but on the merits in their entirety.* Appellees are also aware that the New Jersey Supreme Court's remand does not involve the judgment itself, but whether that judgment shall be fully or only partially retroactive.

In these circumstances, appellees are certainly aware that the question of retroactivity is a State, not a Federal issue—the "intermediation" question will be decided under State law, without a glance to the Commerce Clause and its interpretation by this Court—and that it is an issue which will not be reviewed by this Court. See *Great Northern R. Co. v. Sunburst Oil & Ref. Co.*, 287 U.S. 358, 364 (1932). Hence, it is merely shrewd (and perhaps misleading) for appellees to suggest to this Court that its failure to act now will someow produce a record

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* Appellees concede that "The New Jersey Court has decided the applicability of the statute in question. . . ." (*Joint Motion*, pp. 9-10).

below on the constitutional issues; that there is some missing element which will be supplied on the remand below.

It is interesting to note that while the Attorney General of New Jersey strenuously argues in Point I of his brief that only a further trial will establish a complete record on the constitutional issues, he has no problem dealing with these issues, and supplying his own allegations in lieu of facts, in Point II of his brief. It is even more interesting to note that the Attorney General, while having the right to intervene in any proceeding involving the constitutionality of a state statute, *N.J.R. Civ. Proced.* No. 4:28-4(a) and (d), has already notified the New Jersey Superior Court that he will not participate in the trial of this matter on the New Jersey Supreme Court's remand.*

There is no doubt that a trial is required here. But that trial, to be productive, must be a trial of the constitutional issues, not of the question of partial retroactivity. And it must be a trial in the framework of proper constitutional principles, not on the basis of the decision below which *holds* that New Jersey can regulate Pennsylvania licensees and Pennsylvania loans, *without proof of fraud or substantial intrastate activities in New Jersey.*

Appellees' finality argument is askew, off-center. They claim that post-judgment relief, which may or may not be granted, renders the judgment itself interlocutory (p. 10 of *Joint Motion*). They confuse purely State is-

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* This is reflected in an Order of the New Jersey Superior Court, entered April 28, 1970 and reprinted in a Supplemental Appendix, attached hereto. The Order adjourns proceedings on the remand "pending final disposition of the aforementioned appeals by the Supreme Court of the United States."

sues, such as the meaning of "intermediation," with matters of Federal constitutional dimension. They rely heavily on older, restrictive precedents and slough off or disregard the more recent decisions of this Court.

A fair analysis of the practical considerations presented by the case at bar, in the light of the legal principles articulated by this Court, clearly demonstrates that this is an appeal from a final judgment and this Court has jurisdiction to entertain it:

1. *Further proceedings on remand*: Appellees suggest that the New Jersey Supreme Court's remand on the question of retroactivity shows that there is no "final word of a final court," *Market Street R. Co.* v. *Railroad Com. of Cal.*, 324 U.S. 548, 551 (1945). But finality is not so simply resolved. There is a "penumbral area" which is not susceptible to "a mechanical rule." *Radio Station WOW, Inc.* v. *Johnson*, 326 U.S. 120, 124-25 (1945). There is a "twilight zone" which requires a "practical rather than a technical construction" of the finality rule. *Gillespie* v. *United States Steel Corp.*, 379 U.S. 148, 152 (1964). Thus, finality "does not necessarily mean the last order possible to be made in a case," *Id.*, particularly as it has been interpreted in recent years. See *United States* v. *McWhirter*, 376 F. 2d 102, 104-05 (5 Cir. 1967); Stern & Gressman, *Supreme Court Practice* §311, pp. 96-99 (4th ed. 1969). In case after case, involving appeals from State as well as Federal courts, the fact that further proceedings below were contemplated, *e.g.*, that the judgment under appeal involved a remand, did not of itself preclude this Court's determination of important issues.*

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* *United States* v. *General Motors Corp.*, 323 U.S. 373, 377 (1945); *Radio Station WOW, Inc.* v. *Johnson*, 326 U.S. 120,

(*Footnote continued on following page*)

2. *Reasons for the finality rule*: "This requirement has the support of considerations generally applicable to good judicial administration. It avoids the mischief of economic waste and of delayed justice." *Radio Station WOW, Inc.* v. *Johnson, supra* (326 U.S. at 124). It avoids piecemeal review. See *Gillespie* v. *United States Steel Corp., supra* (379 U.S. at 152-53); *Hudson Distributors* v. *Lilly & Co.*, 377 U.S. 386, 398-400 (1964) (Harlan, J., dissenting). There are two aspects to this point:

First, if the appeal could be mooted by reason of the result in further proceedings below, jurisdiction may be declined, see *Republic Natural Gas Co.* v. *Oklahoma*, 334 U.S. 62, 71 (1948); *cf. Brady* v. *Maryland*, 373 U.S. 83, 85 at n. 1 (1963), although recent rulings have accepted appeals notwithstanding potential mootness. See *Avery* v. *Midland County*, 390 U.S. 474, 487 (1968) (Harlan, J.,

(*Footnote continued from preceding page*)

123-27 (1945); *Land* v. *Dollar*, 330 U.S. 731, 734 at n. 2 (1947); *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541, 545-47 (1949); *Larson* v. *Domestic and Foreign Commerce Corp.*, 337 U.S. 682, 685 at n. 3 (1949); *Johnson* v. *Muelberger*, 340 U.S. 581, 583 (1951); *Sears, Roebuck & Co.* v. *Mackey*, 351 U.S. 427 (1956); *Cold Metal Process Co.* v. *United Eng. & F. Co.*, 351 U.S. 445 (1956); *Goodall-Sanford* v. *United Textile Workers*, 353 U.S. 550, 551 (1957); *Brown Shoe Co.* v. *United States*, 370 U.S. 294, 304-311 (1962); *Local No. 438* v. *Curry*, 371 U.S. 542, 548-51 (1963); *Mercantile Nat. Bank* v. *Langdeau*, 371 U.S. 555, 557-58 (1963); *Brady* v. *Maryland*, 373 U.S. 83, 85 at n. 1 (1963); *Packinghouse Workers* v. *Needham Packing Co.*, 376 U.S. 247, 249 at n. 2 (1964); *Hudson Distributors* v. *Lilly & Co.*, 377 U.S. 386, 389 at n. 4 (1964); *Gillespie* v. *United States Steel Corp.*, 379 U.S. 148, 152-54 (1964); *Rosenblatt* v. *American Cyanamid Company*, 15 L. Ed. 2d 39, 42-43 (Goldberg, J., in chambers, 1965), *appeal dismissed*, 382 U.S. 110 (1965); *Mills* v. *Alabama*, 384 U.S. 214, 217-18 (1966); *Avery* v. *Midland County*, 390 U.S. 474, 478 at n. 2 (1968).

dissenting); *Mills* v. *Alabama*, 384 U.S. 214, 222-23 (1966) (Harlan, J., dissenting); *Rosenblatt* v. *American Cyanamid Company*, 15 L. Ed. 2d 39, 42 at n. 7 (1965) (Goldberg, J., in chambers).

In any event, the Federal constitutional issues projected in the instant appeal cannot be mooted by further proceedings because such proceedings are limited to the single issue of full versus partial retroactivity of the judgment. No matter what happens below, appellants would still be precluded from making secured loans to New Jersey residents unless appellants establish an office in New Jersey, obtain a license from New Jersey and comply with New Jersey regulations. And no matter what happens below appellants could not recover interest on their loans to the appellee-borrowers.

Hence, there is no potential mootness here. If jurisdiction is declined now, on the ground of lack of finality, appellants will be compelled to appeal the same issues again.

Second, there is the reluctance to review appeals where further proceedings below "may generate additional federal questions." *Republic Natural Gas Co.* v. *Oklahoma*, *supra* (334 U.S. at 71-72); but see the more recent case of *Hudson Distributors* v. *Lilly & Co.*, *supra* (377 U.S. 386), where the appeal was accepted despite the presence of Federal questions which were yet to be resolved by the Ohio courts and despite the fact that "there is every likelihood that the cases will be brought back to this Court for a second time . . ." *Id.* at 399 (Harlan, J., dissenting).

Here, however, no such likelihood exists. Rather, as in *Radio Station WOW, Inc.* v. *Johnson*, *supra* (326 U.S. at 127), the proceeding on remand "could not remotely give rise to a Federal question" because it will concern the

single issue of retroactivity—all other issues will be barred by reason of res judicata. See, *e.g.*, *Misani* v. *Ortho Pharmaceutical Corp.*, 44 N.J. 552, 555, 210 A. 2d 609, 610 (1965), *appeal dismissed*, 382 U.S. 203 (1965), and authorities cited in section 3, *infra*. And the single issue of retroactivity has been held by this Court to be a State question, not a matter of Federal constitutional law. *Great Northern R. Co.* v. *Sunburst Oil & Ref. Co.*, 287 U.S. 358, 364-65 (1932); *cf. Oklahoma Tax Commission* v. *Texas Co.*, 336 U.S. 958 (1949).

3. *The traditional rule*: The instant appeal would pass muster even under the more restrictive traditional rule. As the authorities cited earlier demonstrate, that rule would not mechanically prohibit review merely because further proceedings were ordered by the courts below. See, *e.g.*, *Radio Station WOW, Inc.* v. *Johnson*, *supra* (326 U.S. at 123-27), a decision handed down the same year that *Market Street R. Co.* was determined.

Nor, in our view, would the traditional rule defeat jurisdiction where, as here, there is in fact a final judgment on the merits—the "final word of a final court"—and the only open question is whether that judgment should be fully or just partially retroactive. *Cf. Radio Station WOW, Inc.* v. *Johnson, supra; United States* v. *General Motors Corp.*, 323 U.S. 373, 377 (1945). Indeed, this appeal is limited to that part of the judgment of the New Jersey Supreme Court which affirms on the merits, *Appendix A to First Mercantile's Jurisdictional Statement*, a limitation which is permitted by Rule 10(2) of this Court's Rules. *Cf. Sears, Roebuck & Co.* v. *Mackey*, 351 U.S. 427 (1956); *Cold Metal Process Co.* v. *United Eng. & F. Co.*, 351 U.S. 445 (1956).

This is not a case like *Gospel Army* v. *Los Angeles*, 331 U.S. 543 (1947), relied upon by appellees. There,

under California law, the California Supreme Court's reversal of a lower court's decision effectuated a remand of the case for a new trial and placed the parties "in the same position as if the case had never been tried." *Id.*, at 546.

By contrast, in the instant case, as in *Johnson* v. *Muelberger*, 340 U.S. 581, 583 (1951), the Federal constitutional questions, determined below and appealed here, are "no longer open as an issue upon return of these proceedings" to the lower State courts. The reason is that the determination of these questions, under well-established New Jersey precedents, is binding on the parties; it is the law of the case and cannot be disturbed.*

In short, the traditional view would regard the judgment entered below as final and the possibility of partial post-judgment relief as extraneous.

4. *The separate issue exception*: In *Radio Station WOW, Inc.* v. *Johnson, supra* (326 U.S. at 126), this Court reviewed a judgment which ordered rescission of a radio station lease and an accounting. "In effect, such a controversy is a multiple litigation allowing review of the

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* See, *e.g.*, *Sarson* v. *Mueller*, 105 N.J.L. 212, 213, 143 A. 428 (E.&A. 1928); *U.S. Pipe, etc.* v. *United Steelworkers of America*, 37 N.J. 343, 351-52, 181 A. 2d 353, 357 (1962); *Misani* v. *Ortho Pharmaceutical Corp.*, 44 N.J. 552, 555, 210 A. 2d 609, 610 (1965), *appeal dismissed*, 382 U.S. 203 (1965); *Deverman* v. *Stevens Builders*, 35 N.J. Super. 300, 302, 114 A. 2d 15, 16 (App. Div. 1955); *Ehnes* v. *King*, 50 N.J. Super. 109, 113, 141 A. 2d 62, 64 (App. Div. 1958); *Lathrop* v. *Lathrop*, 57 N.J. Super. 532, 541, 155 A. 2d 106, 110 (App. Div. 1959). If appellees will relinquish their rights under these decisions, appellant would be happy to litigate the constitutional issues at a plenary hearing and develop the record which appellees say is incomplete.

adjudication which is concluded because it is independent of, and unaffected by, another litigation with which it happens to be entangled." *Id.*

Gradually, this exception was enlarged and the traditional finality rule was relaxed. Stern & Gressman, *Supreme Court Practice* §3.11, pp. 96-99 (4th ed. 1969).* "The Court is now more concerned with the practical importance of a prompt decision by it of the federal question decided by the state court, and less with whether the judgment is final in the strict procedural sense." *Id.* at 99; *compare Republic Natural Gas Co.* v. *Oklahoma, supra* (334 U.S. 62), a 1948 5-4 decision upon which appellees rely, *with Brown Shoe Co.* v. *United States,* 370 U.S. 294 (1962), which cuts the other way. Formal severability of the issues under appeal is no longer a rigid requirement. See *Gillespie* v. *United States Steel Corp., supra* (379 U.S. at 153).

The separate issue exception has been widely used. As indicated, a rescission order was held separate and therefore reviewable, although the order also required an accounting and the accounting was yet to take place. *Radio Station WOW, Inc.* v. *Johnson, supra.* A full faith and credit issue was extracted from an estate contest, *Johnson* v. *Muelberger, supra* (340 U.S. at 583), and a remand for redetermination of a criminal defendant's sentence did not preclude review of whether the remand should also have comprehended the question of guilt. *Brady* v. *Maryland, supra* (373 U.S. at 85, n. 1). Appeals were allowed from the dismissal of two out of four counts in a complaint, *Sears, Roebuck & Co.* v. *Mackey, supra* (351 U.S. 427), and from the adjudica-

* This is admitted by appellees. NJAGb8; *Joint Motion,* p. 10.

tion of a claim, but not of a related counterclaim. *Cold Metal Process Co.* v. *United Eng. & F. Co., supra* (351 U.S. 445).

Interlocutory questions were held separate and appealable in *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541, 545-47 (1949) (posting of security for costs), in *Local No. 438* v. *Curry*, 371 U.S. 542, 548-50 (1963) (jurisdiction), in *Mercantile Nat. Bank* v. *Langdeau*, 371 U.S. 555, 557-58 (1963) (venue), and in *Rosenblatt* v. *American Cyanamid Company, supra* (15 L. Ed. 2d at 42-43) (jurisdiction).* If these interlocutory questions, determined well in advance of a trial on the merits, were "final judgments" for purposes of appeal, surely a final judgment on the merits is reviewable, despite the existence of an open issue as to the retroactive impact of that judgment.

Three other decisions in this area should be emphasized. In *Brown Shoe Co.* v. *United States, supra* (370 U.S. 294), a merger was held to violate the Clayton Act, but the trial court reserved its ruling on the complex question of implementing divestiture. This Court, taking a "pragmatic approach" to finality (370 U.S. at 306), ruled that there was jurisdiction to review the adjudication on the merits.

The instant case is easier: the implementation of the judgment below involves far less complexity than the divestiture problem in *Brown Shoe*. Moreover, in *Brown Shoe*, the danger of piecemeal appeals was substantial. As Justice Harlan said in dissent: "a second appearance of this case on our docket is not an imaginative possi-

* See also *Suess* v. *Stapp*, 407 F. 2d 662, 663 (7 Cir. 1969) (lis pendens cancelled).

bility but a reasonable likelihood" (370 U.S. at 362).* Here, however, that danger does not exist; as demonstrated in paragraph 2, *supra*, the only remaining issue is a State question, not reviewable by this Court.

A second precedent to consider is this Court's unanimous decision in *Packinghouse Workers* v. *Needham Packing Co.*, 376 U.S. 247 (1964). The case arose in an Iowa court. A labor union sued to compel arbitration. The employer's defense was that the obligation to arbitrate was terminated because the union had breached a no-strike clause. For the same breach, the employer counterclaimed for damages.

Pursuant to Iowa procedure, the employer moved before trial for an order denying the union's claim. The Iowa trial court granted the motion and the Iowa Supreme Court affirmed. Justice Harlan, speaking for the Court, found that "our jurisdiction was properly invoked" because the Iowa order, although "deemed interlocutory for purposes of appeal" under Iowa procedural rules, nevertheless is a "final order . . . adjudicating the point so determined, *which shall not be questioned on the trial of any part of the case of which it does not dispose*," according to the same rules. *Id.* at 249, n. 2 (emphasis added).

Quite obviously, the case at bar is in the same posture: as demonstrated earlier, the judgment of the New Jersey Supreme Court on the merits—on the Federal constitutional issues—is the law of the case and cannot be disturbed. And in New Jersey, unlike Iowa, there is not

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* "For if the terms of the divestiture are indeed so difficult to formulate and so interrelated with market conditions, it is most unlikely that the decree to be issued by the District Court will turn out to be satisfactory to both parties." *Id.*

even the hurdle of a procedural rule which deems the order "interlocutory for purposes of appeal."

A third precedent requires attention. In *Hudson Distributors* v. *Lilly & Co., supra* (377 U.S. 386), an 8 to 1 decision, with Justice Harlan dissenting, a drug retailer sued two manufacturers of trademarked pharmaceuticals in the Ohio courts. The relief requested was invalidation of the Ohio Fair Trade Act under Ohio and Federal law. There was a counterclaim seeking enforcement of the Act against the plaintiff.

The trial court invalidated the Act, but the intermediate appellate court reversed and remanded for trial of the counterclaim. The Ohio Supreme Court affirmed. In answer to the counterclaim, the plaintiff raised factual defenses, as well as defenses arising under Ohio law and Federal antitrust legislation. Nevertheless, this Court accepted jurisdiction, holding:

> *"The fact that separate and unresolved issues are pending in the Ohio courts and subject to 'further proceedings' therein on the cross-petition does not render the judgment of the Ohio Supreme Court on the issue here considered and decided non-final or unappealable within the meaning of 28 USC §1257."* *Id.* at 389, n. 4; emphasis added.

Appellees are utterly wrong in attempting to distinguish *Hudson Distributors* on the ground that the issue there appealed was "capable of finally determining the litigation between the parties" (*Joint Motion*, p. 11). In fact, the very basis of Justice Harlan's dissent was that the litigation "is still in its early stages" and involved unresolved Federal questions with the result that "there is every likelihood that the cases will be brought back to this Court for a second time, for consideration of

the questions now unresolved." *Id.* at 399. By contrast, the instant appeal will not return to this Court if the Federal constitutional questions presented here are adjudicated at this time.*

To conclude, it is perfectly clear that a final judgment on the merits has been rendered below; and that the minor question of partial post-judgment relief, no matter how it is resolved, will not affect the final judgment.** In such circumstances, more so than in many of the cases cited above, jurisdiction should not be declined for lack of finality. The separate issue exception applies.

5. *The serious public consequences exception:* Where intermediate rulings "may carry serious public consequences," *Radio Station WOW, Inc.* v. *Johnson, supra* (326 U.S. at 124), where there is "a threat of serious erosion of national policy," *Rosenblatt* v. *American Cyanamid Company, supra* (15 L. Ed. 2d at 42), where there are "compelling public considerations," Harlan, J., dissenting in *Hudson Distributors* v. *Lilly & Co., supra* (377 U.S. at 400), this Court will relax the finality doctrine and accept jurisdiction.

No intermediate ruling is involved in the case at bar, as we have demonstrated above. Nevertheless, it is worth noting that serious public consequences will flow from a rejection of this appeal.

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* The point is covered in section 2, *supra*.

** It has been noted that "Piecemeal review, against which the rule of finality is aimed, is not as decisive a consideration after judgment as before judgment." *Joseph F. Hughes & Co.* v. *United Plumbing & Heating, Inc.*, 390 F. 2d 629, 630 (6 Cir. 1968); see *Plymouth Mut. L. Ins. Co.* v. *Illinois Mid-Continent L. Ins. Co.*, 378 F. 2d 389, 391 (3 Cir. 1967).

Important national policies will be eroded. Interstate commerce has been stopped at the borders of New Jersey and will remain that way unless this Court acts. The courts of New Jersey have peremptorily refused to recognize Pennsylvania's power to license and regulate Pennsylvania loans and lenders; these courts will not extend full faith and credit to Pennsylvania legislation unless this Court reverses the judgment below. And the denial of due process of law, which has already occurred, will persist absent intervention now. *Cf. Rosenblatt,* 15 L. Ed. 2d at 42.

Moreover, this case is not merely a dispute between private litigants. The State of New Jersey argues for appellees and the Commonwealth of Pennsylvania, to protect its "vital interests" (*Amicus brief,* p. 2), has joined with appellants. This interstate "discord" is "at war with the considerations of comity" and could well give rise to reciprocal retaliation. *Oxford Consumer Discount Co.* v. *Stefanelli,* 55 N.J. 489, 500, 262 A. 2d 874, 880 (1970) (Weintraub, C.J., dissenting); see *Forgan* v. *Bainbridge,* 34 Ariz. 408, 274 Pac. 155, 158 (1928); Leflar, *Choice-Influencing Considerations in Conflicts Law,* 41 *N.Y.U.L. Rev.* 267, 286-87 (1966).

6. *The exception for rulings which are "fundamental to the further conduct of the case":* As early as 1945, this Court relaxed the finality requirement where the ruling under appeal was "fundamental to the further conduct of the case." *United States* v. *General Motors Corp.,* 323 U.S. 373, 377 (1945).* Subsequent decisions were to the same effect. *Land* v. *Dollar,* 330 U.S. 731, 734 at n. 2 (1947); *Larson* v. *Domestic and Foreign Commerce*

* The question there involved what items of damage were properly provable in a condemnation action.

Corp., 337 U.S. 682, 685 at n. 3 (1949); *Brady* v. *Maryland, supra* (373 U.S. at 85, n. 1); *Gillespie* v. *United States Steel Corp., supra* (379 U.S. at 153-54).

Doubtless, the reason underlying this exception is to avoid "a totally unnecessary trial," *Rosenblatt* v. *American Cyanamid Company, supra* (15 L. Ed. 2d at 42), to avoid subjecting the litigants "to long and complex litigation which may all be for naught. . . ." *Mercantile Nat. Bank* v. *Langdeau, supra* (371 U.S. at 558). Appellees apparently accept this reasoning. (*Joint Motion*, p. 10).

Clearly, resolution of the Federal constitutional issues presented here is "fundamental to the further conduct of the case" and may avoid "a totally unnecessary trial." What remains to be determined below is the extent to which the judgment of the New Jersey Supreme Court should be applied retroactively. Appellants contend the judgment is erroneous. If appellants are correct, it would be "unnecessary", indeed meaningless, to try the remanded issue because the judgment could not be applied retroactively, prospectively, or at all. The proceeding on remand would "all be for naught."

7. *Serious prejudice to the parties:* This Court has also relaxed the finality rule to avoid serious prejudice to the parties. See *Local No. 438* v. *Curry, supra* (371 U.S. at 550); *Brady* v. *Maryland, supra* (373 U.S. at 85, n. 1); *Hudson Distributors* v. *Lilly & Co., supra* (377 U.S. at 400-01) (Harlan, J., dissenting); *Gillespie* v. *United States Steel Corp., supra* (379 U.S. at 153). Here, the delay appellees seek will seriously prejudice appellant in several ways:

First, as in *Gillespie* v. *United States Steel Corporation,* "the eventual costs . . . will certainly be less if we now pass on the questions presented here rather than

send the case back with those issues undecided" (379 U.S. at 153). The reason is that, as demonstrated in section 6, *supra*, a trial on the issue of retroactivity may be unnecessary.

Second, as appellees suggest (*Joint Motion*, pp. 7-8), appellant has not made secured loans to New Jersey borrowers who have sought funds in Pennsylvania since September 11, 1968. That was the day New Jersey's Appellate Division held that such loans—both principal and interest—would be forfeited, although legitimately transacted in Pennsylvania. To do otherwise would have placed appellant at the mercy of any borrower who wished to stop repaying his loan. Thus, there has already been irreparable injury: appellant will never make up the business it has lost. Further delay in ruling on the constitutional issues will substantially increase the injury to appellant as well as to other Pennsylvania lenders.

Third, appellant lends to high risk borrowers. Many have stopped repaying their loans. Because of the decision below, enforcement of such loans is questionable and would involve lengthy litigation. The longer this proceeding is delayed, the less likely it is that these unpaid loans will be recoverable, no matter what the ultimate legal result turns out to be.

* * *

There is a final judgment here. Jurisdiction should not be declined or delayed.

POINT II

There are substantial questions here.

A. The Commerce Clause.

Appellees chiefly rely on *People* v. *Fairfax Family Fund, Inc.*, 235 Cal. App. 2d 881, 47 Cal. Rptr. 812 (Dist. Ct. App. 1964), appeal dismissed *sub nom. Fairfax Family Fund* v. *California*, 382 U.S. 1 (1965). There, the California court held that California's *Small Loan Law* required the licensing of a Kentucky mail order lending corporation which had important localized California activities. This Court dismissed the subsequent appeal for want of a substantial Federal question. Justice Douglas, viewing the facts differently, dissented on the ground that the case involved licensing of a firm "doing an exclusively interstate business" (382 U.S. 1).

But *Fairfax* is plainly distinguishable, as Chief Justice Weintraub pointed out in the dissent filed below, "with respect to both the facts and the issue involved." *Oxford Consumer Discount Co.* v. *Stefanelli*, 55 N.J. 489, 495 at n. 1, 262 A. 2d 874, 878 at n. 1 (1970). "There a Kentucky corporation solicited loans in California by mail and completed the loan transaction by mail after having a credit check made locally in California . . . ." *Id.* There the borrowers never left California and the California court found "no doubt that negotiation for the respective loans takes place within the state . . . ." (235 Cal. App. 2d at 885).

No such substantial contacts exist here. It is undisputed that the borrowers went to Pennsylvania to borrow money; that the loan was made there; and that the lender was a licensed Pennsylvania corporation. There are alle-

gations of solicitation in New Jersey, but no trial was held, no such allegation was proved, and the decision went off on other factors, namely, (a) residence of the borrower and (b) situs of the mortgage.*

Of course, the "issue involved" in *Fairfax* was also different from that presented in the instant appeal; there "the question was not whether the loans should be forfeited but whether the lender should be restrained from continuing the business until a license was obtained." *Oxford,* 55 N.J. at 495, n. 1, 262 A. 2d 878, n. 1 (Weintraub, C.J., dissenting). It is true, as appellees argue, that the California statute involves regulation as well as licensing (*Joint Motion,* p. 14). But despite appellees' citation of more than a dozen sections of the California *Small Loan Law* (*Id.*), they somehow omit any reference to §24458 which permits enforcement in California of small loans "lawfully made outside the state" with respect to principal, interest and charges to the extent allowable in California (10% interest plus substantial charges, §§24451-55).** There is no analogue in New Jersey's statute; loans

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* It should be noted that this case involves a suit on the loan, not on the mortgage; that the mortgage was discharged during the course of litigation; and that the issue is not whether mortgages can be regulated, but whether loans can be forfeited. While full argument must await plenary briefs, it is worth stating that there is substantial authority for the proposition that mortgages are to be regarded as incidental to loans and not as significant contacts for conflicts purposes. See *e.g., Restatement Second, Conflict of Laws* §195, *Comment* a; *Manhattan Life Ins. Co.* v. *Johnson,* 188 N.Y. 108, 111, 80 N.E. 658, 659 (1907); see also Chief Justice Weintraub's dissenting opinion below at 55 N.J. 496-98, 262 A. 2d 878-79.

** Larger loans made outside California are treated similarly. *California Financial Code* §22459.

"lawfully made outside the state" are rendered wholly unenforceable in New Jersey under the judgment entered below.

Finally, in *Fairfax* there was no question of competing regulatory schemes. These were California loans and only California could regulate them. Kentucky did not appear before this Court and assert its interest in the transactions. In marked contrast, the case at bar does involve competing, albeit comparable regulatory provisions. *Oxford*, 102 N.J. Super. at 559, 246 A. 2d at 465 (App. Div. 1968). And Pennsylvania has filed an *amicus* brief which states (at p. 2) that "its vital interests will be adversely affected if the decision of the New Jersey Supreme Court is not reversed . . . ."

All that remains of appellees' argument is a series of bald allegations lacking any basis in the record. Thus, there is no proof, and appellant denies, that licensed Pennsylvania lenders are engaged in "victimization" of New Jersey borrowers or in "maneuvering" to avoid New Jersey supervision (NJAGb19). There is no proof, and appellant denies, the beaming of advertising to New Jersey; the participation in referral schemes; and the use of agents to solicit business (NJAGb20).*

New Jersey's Attorney General concedes: "There is no doubt that to the extent New Jersey would apply the 1965 Act to the activities of appellants *there is a 'burden'*

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*Moreover, appellant questions whether such solicitation of interstate business, even if it existed, would render interstate or Pennsylvania loans subject to New Jersey regulation. See, *e.g.*, *Eli Lilly & Co.* v. *Sav-On-Drugs*, 366 U.S. 276, 278-79 (1961); *Furst* v. *Brewster*, 282 U.S. 493, 497-98 (1931).

placed upon their interstate activities involving transactions with New Jersey residents." (NJAGb15; emphasis added). We contend that burden is substantial and undue. It is unconstitutional.

B. Due Process.

Can one State regulate transactions which are legitimately negotiated and concluded in a neighboring State and are licensed and regulated by that neighboring State? That is the essence of the due process issue which this Court should resolve.

Appellees do not meet this issue. In the Joint Motion (pp. 15-16), appellees cite inapposite insurance precedents from the 1940's and omit *State Board of Ins.* v. *Todd Shipyards Corp.*, 370 U.S. 451 (1962), a more recent decision, and *Alaska Packers Ass'n* v. *Industrial Accident Comm.*, 294 U.S. 532, 540-41 (1935), which is right in point. And in the brief submitted by New Jersey's Attorney General (pp. 22-23), there is the peculiar notion that Pennsylvania's courts and Attorney General will simply defer to the State of New Jersey with respect to regulation of Pennsylvania loans and Pennsylvania lenders.*

New Jersey's Attorney General also relies on a bill which revises the Secondary Mortgage Loan Act (NJAGb 23-24). It has yet to be signed by the Governor; hence, it

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* In an interesting article on loan sharks, published in the May-June 1970 issue of the *Harvard Business Review*, there is this observation: "How does one assign a dollar cost to the role of loan sharking in maintaining large-scale criminal organizations that corrupt or undermine government, *as appears to be the case in New Jersey?*" Seidl, *"Let's Compete with Loan Sharks*, 48 *Harv. Bus. Rev.* #3, pp. 69, 73 (May-June, 1970) (emphasis added).

is hardly probative of anything. In any event, it surely does not avoid the due process question. Indeed, it codifies what the courts below decided: the requirement that out-of-state lenders maintain a New Jersey office (§12(a), NJAG10a) and the regulation of out-of-state transactions, notwithstanding the lack of substantial local contacts (§24(c), NJAG24a).

We have no difficulty with a State's regulation of out-of-state loans where the situs has been "maneuvered" in bad faith—the evil which troubles New Jersey's Attorney General (NJAGb24). See, *e.g.*, *Seeman* v. *Philadelphia Warehouse Co.*, 274 U.S. 403, 408-09 (1927). For example, the California *Small Loan Law* which was sustained in *Fairfax* had an appropriate provision: "Any person who contracts for or negotiates *in this State* a loan to be made outside the State *for the purpose of evading or avoiding this division* is subject to the provisions of this division." *California Financial Code* §24460 (emphasis added).

But New Jersey goes much further. It would regulate loans legitimately made in Pennsylvania. It would supersede Pennsylvania's regulatory provisions. This, in our view, is unconstitutional.

C. Full Faith and Credit.

This issue turns on whether Pennsylvania's *Consumer Discount Company Act* is so offensive to New Jersey public policy as to warrant an exception to the constitutional policy of requiring States to give full faith and credit to the statutes and judgments of sister States. We submit that appellees have proven no such overriding New Jersey interest here. The evidence is to the contrary.

First, New Jersey's Appellate Division itself found that: "Supervision of [Pennsylvania] licensees is com-

prehensive and comparable to that provided for by the New Jersey act." *Oxford Consumer Discount Co.* v. *Stefanelli; supra* (102 N.J. Super. at 559, 246 A. 2d at 465). The New Jersey Attorney General's attack on Pennsylvania's enforcement of its statutes (NJAGb20) is at variance with what the Appellate Division held and, more significantly, is utterly without basis in the record. We, and doubtless the Commonwealth of Pennsylvania (*Amicus brief*, pp. 9-10, 14-15), are willing to try the question whether New Jersey or Pennsylvania has more effective enforcement of loan regulations.

Second, as to the comparative costs to the borrower, we would strongly suggest that Pennsylvania's system of 17%-18% interest and insubstantial charges is far more beneficial to high risk borrowers who are covered by these statutes than New Jersey's 14% limit with substantial charges. Indeed, this proposition is patently evident in the revision of New Jersey's Secondary Mortgage Loan Act, now awaiting the Governor's signature, a revision which generally adopts the Pennsylvania view. As the Statement accompanying the revision notes, the combined impact of New Jersey interest and allowable charges may be equivalent to an effective rate of 50% or more to the borrower, far in excess of what Pennsylvania permits.*

Third, the Pennsylvania act is more protective than New Jersey's in other respects, *Oxford*, 55 N.J. at 496-97, 262 A. 2d 878-79 (Weintraub, C.J., dissenting), as can be demonstrated in a plenary brief.

Fourth, we submit that protection of New Jersey borrowers from the shocking demands of loan sharks on *both* banks of the Delaware is not fostered by destroying

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*The Statement is set forth in the Supplemental Appendix to Oxford's Reply Brief, pp. 1a-3a.

licensed, regulated Pennsylvania lenders. The availability of legal loans in Pennsylvania is an excellent method of driving the loan shark out of business. See Seidl, *Let's Compete with Loan Sharks*, 48 *Harv. Bus. Rev.* #3, p. 69 (May-June, 1970); Felsenfeld, *Consumer Interest Rates*, 23 *Business Lawyer* 931 (1968); *cf. Editorial*, 93 *New Jersey Law Journal* 500 (July 9, 1970), wherein the writer recommends that New Jersey "permit individuals to borrow at competitive market costs from private sources" and that the Legislature remove "unreasonable restraints which presently deny its [New Jersey] citizens effective access to borrowable funds at reasonable interest rates."

CONCLUSION

For the reasons given above and in our Jurisdictional Statement, we urge that probable jurisdiction be noted and that appellees' motion to dismiss this appeal be denied.

Respectfully submitted,

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SUPPLEMENTAL APPENDIX

Order of Superior Court of New Jersey, Law Division—Essex County

This matter being brought before the court upon application of Cummis, Kent & Radin, Esqs., attorneys for plaintiff Oxford Consumer Discount Company of North Philadelphia, and it appearing that both said plaintiff and Intervenor First Mercantile Consumer Discount Company have served upon all parties hereto their respective Notices of Appeal to the Supreme Court of the United States from the judgment in this case of the Supreme Court of the State of New Jersey entered on March 17, 1970, and it further appearing that Intervenor Attorney General of the State of New Jersey has notified the court in writing that he does not desire to participate in the trial of this matter, and the consent of the remaining parties in this action having been obtained; it on this 28th day of April, 1970

ORDERED, that the pre-trial conference in this action, originally scheduled for May 1, 1970, be and is herewith adjourned without date pending final disposition of the aforementioned appeals by the Supreme Court of the United States, and it is further

ORDERED, that the pre-trial conference and any other matter in this action may thereafter be heard by this court upon 30 days' notice filed by ane one or more parties to this action.

The consent to the form and entry of this Order by counsel for defendants Anthony E. Stefanelli and Theresa

Order of Superior Court of New Jersey,
Law Division—Essex County

A. Stefanelli as set forth below in no way constitutes a waiver of her right to object to the participation in the pre-trial conference and trial of this matter by any party other than plaintiff Oxford Consumer Discount Company of North Philadelphia.

/s/ WILLIAM J. CAMARATA,
J.S.C.

We herewith consent to the form and entry of this Order.

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